Office-Supreme Court, U.S.
FILED
AUG 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL SOCIETY FOR
KRISHNA CONSCIOUSNESS, INC.,

Petitioner,

vs.

THE CITY OF EVANSTON,
a municipal corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
ILLINOIS APPELLATE COURT, FIRST DISTRICT

ANSWER TO PETITION FOR WRIT OF CERTIORARI

JACK M. SIEGEL
Attorney for Respondent

JACK M. SIEGEL
39 South LaSalle Street
Room 919
Chicago, Illinois 60603
(312) 263-2968

Pandick Press Midwest, Inc., Chicago • (312) 454-7600

INDEX

	PAGE
STATEMENT OF THE CASE	1
ARGUMENT	11
INTRODUCTION	11
I. There Was No Violation of § 1983 by the City of Evanston	12
II. The Court Properly Denied Attorneys Fees Under 42 U. S. C. § 1988	20
III. The Petitioner's First Amendment Rights Were Not Infringed by the Action of the City of Evanston	25
CONCLUSION	28

TABLE OF AUTHORITIES

PAGE

Cases

American Communications Assn. v. *Douds,* 339 U. S. 382, 94 L. Ed. 925, 943 (1950) 11, 25
Arlington Heights v. *Metropolitan Housing and Development Corp.,* 429 U. S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977) 12, 17
Baker v. *McCollan,* 443 U. S. 137, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979) 18
Beard v. *Mitchell,* 604 F. 2d 485, 494 (7th Cir. 1979) 15
Bonner v. *Coughlin,* 545 F. 2d 565 (7th Cir. 1976). 14, 15
Chastang v. *Flynn,* 541 F. 2d 1040, 1045, (4th Cir. Md. 1976) 21
Christiansburg Garmet Co. v. *EEOC,* 434, U. S. 412, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978) 23
City of Evanston v. *Ridgeview House, Inc.,* 64 Ill. 2d 40 (1976) 3
City of Memphis et al. v. *Green et al.,* ____ U. S. ____ (#79-1176 decided April 20, 1981) 12, 17
City of Newport et al. v. *Fact Concerts, Inc.,* No. 80-396, decided June 26, 1981 13
Corporation of Presiding Bishop v. *City of Porterville,* 90 Cal. App. 2d 656, 203 P. 2d 823 26
Corporation of Presiding Bishop v. *Porterville,* 338 U. S. 805, 70 S. Ct. 78 (1949) 11
Coston Chapel A.M.E. Church v. *Chaddick,* 9 Ill. App. 3d 321 (1972) 26
Goffinet v. *County of Christian,* 65 Ill. 2d 40, 53 (1976) 5, 18
Huemmer v. *Mayor and City Council of Ocean City,* 632 F. 2d 371 (4th Cir. 1980) 20
Jamison v. *McCurrie,* 565 F. 2d 483, 486 (7th Cir. 1977) 15

PAGE

Kotrich v. *County of DuPage*, 19 Ill. 2d 181 (1960) 3
Milwaukee Co. of Jehovah's Witnesses v. *Mullen*, 330 P. 2d 5, 27 26
Minney v. *City of Azusa*, 330 P. 2d 255, 259, 266 26
New York Gaslight Club, Inc. v. *Carey*, 447 U. S. 54, 64 L. Ed. 2d 23, 100 S. Ct. 2024 (1980) 23
Paul v. *Davis*, 424 U. S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) 15
People ex rel. MacMahon v. *Davis*, 284 Ill. 439 (1918) 7
Procunier v. *Navarette*, 434 U. S. 555, 55 L. Ed. 2d 24, 98 S. Ct. 885 (1978) 18
St. James Temple v. *Board of Appeals*, 100 Ill. App. 2d 302, 395 U. S. 946, 23 L. Ed. 2d 464 (1969) 11, 25
Schmeisser v. *Village of Niles*, 113 Ill. App. 2d 114 (1969) 3
Smith v. *United Presbyterian Church*, 331 Mich. 1, 52 N. W. 2d 568 26
South Side Move of God Church v. *Zoning Board of Appeals*, 47 Ill. App. 3d 723 (1977) 26
Stringer v. *City of Chicago*, 464 F. Supp. 887, 890 (N. D. Ill. 1979) 16
Washington v. *Davis*, 426 U. S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976) 12, 17
Wood v. *Strickland*, 420 U. S. 308, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975) 17
Zion Evangelical Lutheran Church v. *City of Detroit Lakes*, 21 N. W. 2d 203 26

Statutes

42 U. S. C. § 1983, 1988 ..... 1, 11, 13
Zoning Enabling Act, Ill. Rev. Stats., 1979, ch. 24 § 11-13-1.1 2
Ill. Rev. Stats., 1979, ch. 24, § 3-11-20 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL SOCIETY FOR
KRISHNA CONSCIOUSNESS, INC.,

Petitioner,

vs.

THE CITY OF EVANSTON,
a municipal corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
ILLINOIS APPELLATE COURT, FIRST DISTRICT

ANSWER TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a conventional zoning case. Its only distinctive characteristic is the fact that the petitioner is a religious organization. The controversy in question was simply whether or not the petitioner was entitled to a special use permit to utilize a building which it had purchased and occupied in the face of an ordinance prohibiting its use. The petitioner attempted to use 42 U. S. C. § 1983 as a vehicle to raise irrelevant First Amendment questions in what was essentially a traditional land use controversy.

The petitioner, in its statement of the case, carefully avoids the relevant facts which remove this controversy from the realm of constitutional considerations which would warrant this court's attention. The statement of fact is noteworthy not for what it says, but for what it omits.

On August 9, 1972 the petitioner entered into a lease for the premises at 1014 Emerson Street, Evanston, Illinois, with one Earl Zweifel. The term of the lease was October 1, 1972 through September 30, 1977. The premises in question were zoned for the C-2 district classification under the zoning ordinance of the City of Evanston. Under that classification, a theological school, church or temple is not a permitted use but is available only as a special use.

Under the provisions of the Zoning Enabling Act of the State of Illinois, special uses may be provided in municipal zoning ordinances. The statute provides:

> "Such uses may include but are not limited to public and quasi-public uses affected with the public interest, uses which may have a unique, special or unusual impact upon the use or enjoyment of neighboring property, and planned developments. A use may be a permitted use in one or more zoning districts, and a special use in one or more other zoning districts. A special use shall be permitted only after a public hearing before some commission or committee designated by the corporate authorities, with prior notice thereof given in the manner as provided in Sections 11-13-6 and 11-13-7." (Ill. Rev. Stat., 1979, ch. 24 § 11-13-1.1)

The zoning ordinance of the City of Evanston implemented the statutory grant of authority by designating special uses in the various districts and providing standards which had to be met before such special uses could be granted.

The statute in question provides that "the granting of permission thereof may be subject to conditions reasonably necessary to meet such standards." The validity of the special

use technique, including the establishment of conditions, has been widely accepted in Illinois and repeatedly sustained by its courts. *Kotrich* v. *County of DuPage,* 19 Ill. 2d 181 (1960); *Schmeisser* v. *Village of Niles,* 113 Ill. App. 2d 114 (1964); *City of Evanston* v. *Ridgeview House, Inc.,* 64 Ill. 2d 40 (1976).

At the time of entering into the original lease, the petitioner knew, or should have known, that its proposed use was not permitted under the zoning ordinance of the City of Evanston. Nevertheless the petitioner took possession of the premises on October 1, 1972. The building at that time was totally unfit for human habitation, although some forty members of the organization including children moved into the structure.

Notwithstanding the fact that at no time did the petitioner comply with the ordinances of the City of Evanston, it continued to utilize the structure in question for a temple and dwelling for its membership from October 1, 1972 until the spring of 1980.

The petitioner's statement of facts fails to note that the petitioner occupied the premises illegally and never relinquished the use of the premises until it voluntarily moved out in 1980 rather than comply with the ordinances relating to health and safety. Such compliance was required by the trial court as a condition of the special use permit. Thus, despite the alleged deprivation of due process, the petitioner in fact continued to use and enjoy the premises and no acts of the respondent ever created any loss of such use and enjoyment, notwithstanding the fact that said use was illegal for the entire duration of the petitioner's occupancy. This case represents a successful effort by the petitioner to flaunt the admittedly valid ordinances of the City of Evanston to illegally use the premises in violation of the zoning, building, housing, plumbing, electrical and other safety codes for eight years.

On October 4, 1972, having already moved into the premises in violation of the ordinances of the City, the petitioner first submitted its application to the Zoning Board of Appeals of the City of Evanston for a special use to allow "retention of the use of the building as a theological school with related uses." The Zoning Board of Appeals is an administrative body charged with conducting public hearings and making recommendations to the City Council on a variety of zoning matters including special uses.

The Board made an original recommendation approving the proposed use subject to certain terms and conditions *including compliance with all provisions of the zoning ordinance, building code, housing code and applicable City ordinances.* This recommendation was referred back to the Board by the City Council for further findings of fact. After additional hearings, the Zoning Board again reported back to the City Council that it recommended a special use "conditioned upon all violations of the Housing, Electrical, Plumbing, and Building Codes being corrected within 120 days of receipt of this recommendation by the City Council." It specifically recommended: "Failure to eliminate all violations of the Housing, Electrical, Plumbing and Building Codes within the aforesaid 120 day period shall result in a recommendation that this application be denied."

On March 25, 1974, the City Council adopted ordinance 7-0-74 granting the special use. The ordinance contained several conditions. Included were the elimination of all wholesaling and storage of incense on the premises or other commercial activities. An additional condition was that "all violations of the housing, electrical, plumbing and building codes shall be corrected within 180 days of the effective date of the ordinance." There was to be a maximum occupancy of 46. The 180-day period would expire on September 25.

The petitioner failed to apply for any permits to correct the multiplicity of violations. On September 18, the petitioner addressed a request to the Chairman of the Planning and

Development Committee of the City Council indicating that it had not brought the premises up to Code requirements and seeking an extension of time in which to meet the requirements of the ordinance in that respect.

On November 4, 1974, the City Council, without a hearing before the Zoning Board, purported to adopt Ordinance 90-0-74, which amended Ordinance 7-0-74. It extended the time for eliminating all violations of housing, electrical, plumbing and building codes to February 15, 1975. Additional conditions were also added to the special use. Certain permits were taken out by a contractor for the petitioner on November 5. These permits did not cover all the work required to be done to correct all violations.

On November 11, at its next regular meeting, the City Council reconsidered its previous action and withdrew the ordinance purportedly adopted on November 4, 1974. The petitioner continued to occupy the premises. On November 13, 1974, the petitioner was informed by certified mail, and the permits issued on November 5 were revoked. The special use permit granted in March of 1974 therefore expired by its own terms because of the failure of the petitioner to comply with the conditions which were imposed in the special use ordinance. *Goffinet* v. *County of Christian,* 65 Ill. 2d 40, 53 (1976).

On December 23, 1974, the petitioner filed a chancery proceeding in the Circuit Court of Cook County entitled: "*International Society for Krishna Consciousness* v. *City of Evanston, et al.,* " which was docketed as 74 CH 8132, wherein the petitioner sought to enjoin the City from interfering with any work carried out pursuant to the original permits and from interfering with the special use granted by Ordinances 7-0-74 and 90-0-74. On January 2, 1975, the petitioner sought a preliminary injunction, which was denied. The complaint of the petitioner was subsequently dismissed for want of prosecution. No appeal was taken.

On February 20, 1975, the petitioner purported to enter into an installment contract for warranty deed with Earl T. Zweifel, the owner of the property. The contract called for a purchase price of $100,000 with monthly installments of $1,266.80. On May 16, 1975, three months after the contract had been entered into, the petitioners again applied to the Zoning Board of Appeals for a special use permit to use the premises as a theological school with accessory uses. The Zoning Board of Appeals again recommended approval, subject to compliance with all other provisions of the zoning ordinance and other applicable laws, as well as the previous conditions originally imposed on the special use.

However, after consideration by the Planning and Development Committee, a standing committee of the City Council, the City Council denied the second application for a special use permit. The Committee based its recommendation on findings of fact which were reported to the City Council indicating that the applicant had not met the ordinance requirements for the granting of special uses, and because of the history of dilatory responses in meeting code requirements. The Committee also found that the applicant had not demonstrated that the use would not cause appreciable injury to the value of other property in the neighborhood and cited the dilatory responses to needed code corrections.

Following the denial of the special use permit by the City Council in September of 1976, the petitioner filed a second complaint in the Circuit Court of Cook County. Its motion for a preliminary injunction was denied. Subsequently, the petitioner amended its complaint seeking to transform a conventional zoning case in a 1983 action. An appeal was taken from the denial of the preliminary injunction. While this appeal was pending, the trial court granted a motion by the City for summary judgment. An appeal from this final judgment was consolidated and heard together in the case styled "*Inter-*

national Society for Krishna Consciousness v. *City of Evanston,* 53 Ill. App. 3d 443." During this entire period, the petitioner continued to occupy the premises using it as a temple and a dwelling for some forty persons without seeking to remedy any of the outstanding violations of the housing, building, plumbing and fire codes. During this period a fire took place in the premises but the petitioner remained in possession.

The Appellate Court reversed the Circuit Court of Cook County holding that the matter was not ripe for summary judgment. It also ruled that the City erred in reconsidering the extension of time originally granted in November of 1974. This holding was clearly erroneous and arose out of a misunderstanding of the ordinances in question. The court's erroneous view is particularly pertinent, because although the Appellate Court specifically held that it was not passing on the merits (A 37), its ruling with respect to the right to rescind the action extending the time for compliance became the basis for the trial court's subsequent ruling that there had been a deprivation of procedural due process. It subsequently became the sole basis for the Appellate Court's holding in its second decision.

The Appellate Court recognized that the City Council had the authority to reconsider and rescind its action under the usual rules of parliamentary procedure which gave the right to reconsider at the same or following City Council meeting. It correctly cited Ill. Rev. Stat., 1975, ch. 24 § 3-11-20, Rule 21.1 of the Evanston City Council and *People ex rel. MacMahon* v. *Davis,* 284 Ill. 439 (1918) (A 31).

A legislative body's right to reconsider an act is, of course, basic and undisputed. The Appellate Court, however, looked beyond the act itself and concluded that the only reason for the reconsideration was the Corporation Counsel's opinion that an amendment to a special use ordinance could not be adopted without a public hearing. Although this opinion was absolutely

correct, the Appellate Court improperly attempted to determine the motivation of the City Council's action rather than merely considering the act of reconsideration itself.

In the first Appellate Court opinion, the court explained its basis for ruling that a public hearing was not necessary to amend a special use ordinance. It cited Section XII, C-4 of the zoning ordinance which provided that a special use permit shall not be valid after a period of one year except that "said period may be extended by the Council for such time as it shall determine, for good cause and without further hearing before the Board." The Appellate Court erroneously concluded that this provision was pertinent to the action of the City Council in extending the time for code compliance. (A. 30)

It overlooked the fact that the original special use ordinance was not being extended beyond one year but that in fact the ordinance adopted on November 4, 1974 changed the conditions of the special use and extended the period for compliance with code violations from September 25, 1974 (the original 180 days) to February 15, 1975. This clearly was not an extension by the Council of the special use permit beyond the one year period but in fact constituted an amendment to the original ordinance of March 25, 1974.

In its subsequent opinion found at 89 Ill. App. 3d 701, 708, the Appellate Court made no effort to correct this obvious error but instead merely relied upon its original holding without further analysis. This purported erroneous "revocation" was the single act which the Appellate Court found violated Krishna's procedural due process rights. (A. 10) Thus, whatever claim for violation of due process the petitioner now raises is based solely upon the act of the City Council on November 11, 1974.

It must be emphasized that there was in fact no violation of due process, procedural or substantive, because the City Council was proceeding in accordance with its own rules and case

law permitting reconsideration of a previously adopted ordinance for whatever reason. Clearly, there was in fact no deprivation of any rights because the petitioner remained in possession and at no time was deprived of the use of the premises by virtue of the City Council action on November 11, 1974.

The petitioner alleges that it was denied the right to introduce evidence of its denial of equal protection during the course of the trial. This claim is based upon the failure of the petitioner to lay the proper foundation for the admission of such evidence and the failure to prove comparability of circumstances, which, of course, was necessary to admit such evidence. The Appellate Court in its second opinion properly pointed out that the mere fact that a property owner has applied for a special use permit does not place the applicant within a single class which could serve as a model to which all special use applications must conform.

The court ruled that the trial court correctly excluded the evidence of other special uses as it had no evidentiary basis in the record upon which to find that Evanston had demonstrated clear and intentional discrimination. (A. 7) We suggest that the evidentiary rulings of the trial court as sustained by the Appellate Court were correct and hardly form a basis for consideration of this cause by this Court. The Appellate Court also ruled that the trial court correctly excluded Krishna's offer of proof.

The trial court's judgment order granted the petitioner a special use in accordance with the original ordinance. This included the condition of complying with all applicable code requirements within 180 days. The petitioner concedes it did not appeal from that finding, yet it made no effort to comply with this condition and in fact actually vacated the premises. This fact nowhere appears in the statement of facts in the petition but does appear in the Appellate Court's opinion. (A. 4, 13)

The Appellate Court also found that there was no cognizable substantive due process issue in Krishna's argument. (A. 6) The Court, moreover, specifically found that the property upon which the entire cause of action was based was no longer occupied by the group. The Court, therefore, declined to rule upon the substantive due process claim holding it to have become moot. (A. 5) As a matter of fact, petitioner subsequently sold the property at a price exceeding that which it paid in 1975.

We thus have a situation where petitioner occupied the premises in violation of the building, housing, electrical, plumbing and other codes for eight years without a special use permit as required by the zoning ordinance. Despite its controverted claim of a denial of "procedural due process," it voluntarily relinquished the premises and suffered absolutely no loss or damage. Having profited by its uninterrupted violation of the Evanston police power ordinances, the petitioner now seeks this Court's jurisdiction solely for the purpose of seeking attorneys fees and a purported redress of a deprivation of its rights which in fact never took place.

ARGUMENT

INTRODUCTION

We do not question the fact that state courts have been granted jurisdiction over § 1983 litigation. We suggest, however, that a mere claim of deprivation of rights under a zoning ordinance is not sufficient to give rise to a substantial federal question. This Court has in fact ruled that no such substantial federal question exists in a comparable situation. It dismissed for want of a substantial federal question the case of *Corporation of Presiding Bishop* v. *Porterville,* 338 U. S. 805, 70 S. Ct. 78 (1949). Subsequently this Court cited the *Porterville* case in another opinion with respect to freedom of religion. *American Communications Association* v. *Douds,* 339 U. S. 382, 94 L. Ed. 925 (1950). The Court at page 943 noted,

> "We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas. *Corporation of Presiding Bishop, C.J.C.L.D.S.* v. *Porterville,* 338 US 805, ante, 487, 70 S Ct 78 (1949).

This Court subsequently denied certiorari in an Illinois case, *St. James Temple* v. *Board of Appeals,* 100 Ill. App. 2d 302, 395 U. S. 946, 23 L. Ed. 2d 464 (1969) involving the denial of a special use permit for a church.

We also have no question that a municipality may be sued under § 1983. However, it should be pointed out, that unlike the holding in *Monell* or *Owen* this case does not involve a substantial violation of due process. It involves a controversy over the parliamentary procedure to be followed under Illinois law on reconsideration of an ordinance. Krishna, the petitioner, was never ousted from its premises. It was permitted to make repeated applications for a special use permit, which applications were considered on their merits and the first of which was granted. It was the petitioner's failure to comply

with that first ordinance which resulted in the subsequent denial. The controverted procedural defect, if there was one, does not rise to the magnitude of a constitutional deprivation.

The petitioner suggests that a significant body of federal case law exists to the effect that the passage of an ordinance which results in a constitutional deprivation to a plaintiff is the intent required to be shown under § 1983. Here, of course, there was no passage of an ordinance which resulted in a constitutional deprivation to the petitioner, merely the reconsideration of an extension of time to make repairs. It seems clear, moreover, that as held by the Appellate Court in order for a violation of the Fourteenth Amendment to be established, intent must be shown. *Arlington Heights* v. *Metropolitan Housing and Development Corp.*, 429 U. S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977); *Washington* v. *Davis*, 426 U. S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976), *City of Memphis, et al.* v. *Green et al.*, ____ U. S. ____ (#79-1176 decided April 20, 1981). We suggest that § 1983 as interpreted in *Monell* and *Owen* does not justify the award of damages or attorneys fees in the case at bar.

I.

THERE WAS NO VIOLATION OF § 1983 BY THE CITY OF EVANSTON.

This case does not involve an effort by a municipality to deprive the petitioner of its constitutional rights. The petitioner would seek to impose absolute liability on the part of a municipality because the Appellate Court found a technical violation of procedural due process rights. The petition fails to point out wherein the petitioner was in any way damaged by the act of the City in rescinding the extension of time in a proper parliamentary manner. Whether the corporation counsel's opinion was correct, and a public hearing was required before the conditions could be varied (as opposed to a mere

extension of time for a special use permit) or whether the reconsideration was prompted by other factors not apparent in the record, is immaterial. The record shows that petitioner continued to utilize the premises in question and in fact suffered no injury, while it proceeded to enter into a contract to purchase the property, notwithstanding the fact that it had no special use permit.

The petitioner would transform *Monell* and *Owen* into an absolute requirement that any technical violation of procedural due process must result in damages and attorneys fees. This Court, however has recently recognized that § 1983 does not provide for a raid on the public treasury when no actual damages are shown. *City of Newport et al.*, v. *Fact Concerts, Inc.*, No. 80-396, decided June 26, 1981. The petitioner in the trial court did succeed in having a declaration that the revocation was illegal and an order reinstating the petitioners special use permit. The petitioner chose not to avail itself of that special use permit and never sought the permits required to meet the conditions including compliance with applicable city ordinances. The petitioner, instead, chose to vacate the property in 1980 rather than complying with admittedly valid police power ordinances and subsequently sold the property at a profit.

Thus, there can hardly be a contention that the 1974 reconsideration of the time extension caused any damages to the petitioner. Its failure to avail itself of the relief it purportedly sought is indicative of the fact that the action in the Illinois Appellate Court and in this Court is nothing more than a search for attorneys fees and some kind of punitive damages, hardly grounds for consideration by this Court on a petition for writ of certiorari. The Appellate Court's opinion may be wrong in finding that there was a due process violation. It certainly was not wrong in denying all relief. There was absolutely no injury shown to the petitioner.

The petitioner concedes that there was no evidence in the record that the City Council relied upon the corporation counsel's opinion when it voted to reconsider the extension of time. Since the City Council undoubtedly had full authority to reconsider its action and no damages resulted from its reconsideration, there can have been no violation of § 1983. The petitioner ignores the fact that the respondents defense was not based upon its attorney's interpretation of the zoning ordinance. The thrust of Evanston's defense at all levels was simply the fact that the denial of the special use under all the facts and conditions was a proper exercise of its police power and did not deprive the plaintiffs of their First Amendment rights.

The Appellate Court's first opinion was based upon its view that summary judgement was improper on the state of the record. It carefully avoided any attempt to rule on the merits. Its gratuitous holding with respect to the revocation of the extension of time was totally unnecessary to its decision on the question of summary judgment and was dicta at best. It was unfortunate that it relied upon that dicta to find a technical violation of due process in its second opinion, although it properly held that this technical violation did not give rise to a violation of § 1983. The Appellate Court properly found that the petitioner was not entitled to relief because it had not proven any intentional or malicious or reckless conduct by Evanston. It could very well, have held that there was no grounds for relief because the petitioner in fact had not been damaged.

The petitioner cites several Seventh Circuit decisions for the proposition that a § 1983 plaintiff is not charged with the responsibility of showing malice or intent on the part of the defendant. As a matter of fact, the decisions cited hold directly to the contrary. In the case of *Bonner* v. *Coughlin,* 545 F. 2d

565 (7th Cir. 1976), the Seventh Circuit relied upon *Paul* v. *Davis,* 424 U. S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) for the proposition that

> "The Supreme Court refused to hold that the due process clause of the Fourteenth Amendment and § 1983 'make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state law tort claim.' "

In *Paul,* this Court rejected the concept that § 1983 created a body of general federal tort law. In *Bonner,* the Seventh Circuit went on to hold that

> "The dissenting Justices in *Paul* were of the view that 'intentional conduct' infringing a person's liberty or property interests without due process of law is within the reach of Section 1983 (424 U. S. at 720, 96 S. Ct. at 1170.) They went no further, nor need we."

The Seventh Circuit in *Bonner* went on to say:

> "We hold that the negligence of the guards which caused the loss of Bonner's transcript was not a State deprivation of property without due process of law under the Fourteenth Amendment nor action 'under color of state law' under Section 1983."

To the same effect was the case of *Jamison* v. *McCurrie,* 565 F. 2d 483 (7th Cir. 1977), where the Seventh Circuit at page 486 said:

> "There is no constitutional cause of action for mere negligence on the part of police officers in the case such as this. The plaintiff must show that their misbehaviour was either intentional or in reckless disregard of his constitutional rights. *Bonner* v. *Coughlin,* 545 F. 2d 565 (1976)."

In the later case of *Beard* v. *Mitchell,* 604 F. 2d 485 (7th Cir. 1979), the Seventh Circuit again insisted that mere negligence was insufficient to show a violation of constitutional rights. At page 494, the Court said:

"After our decision in *Bonner* v. *Coughlin,* 545 F. 2d 565 (7th Cir. 1976) (*en banc*), *cert. denied,* 435 U. S. 932, 98 S. Ct. 1507, 55 L. Ed. 2d 529 (1978), we are surprised at the vigor with which plaintiff argues that Mitchell can be held liable for negligently causing Jeff Beard's death. This court, in an *en banc* opinion, refused to recognize a cause of action premised on negligence, holding that intentional conduct or 'reckless disregard' was an essential element of a civil rights claim. Plaintiff contends that the *Bonner* intent standards were formulated for the limited context of claims arising under the Eighth Amendment. The reasoning in *Bonner* is not so limited, and in fact this court has previously held that recklessness is required to recover for deprivations of life, liberty or property without due process under the Fourteenth Amendment. See *Fultom Market Cold Storage Company* v. *Cullerton,* 582 F. 2d 1071, 1080 (7th Cir. 1978) (property); *Jamison* v. *McCurrie,* 565 F. 2d 483, 486 (7th Cir. 1977)"

In a post-*Monell* decision, *Stringer* v. *City of Chicago,* 464 F. Supp. 887 (N. D. Ill., 1979), the District Court for the Northern District of Illinois was considering a civil rights case brought against a municipality. At page 890, the Court carefully analyzed the question of strict liability under § 1983. It said:

"No precedent supports the notion of strict liability under § 1983. Indeed, the Seventh Circuit, joined by most other circuits, has held that in order to prevail on a claim under § 1983 a plaintiff must prove malicious or reckless conduct, and that negligence alone is insufficient. *Jamison* v. *McCurrie,* 565 F. 2d 483 (7th Cir. 1977); *McDonald* v. *State of Illinois, supra; Little* v. *Walker,* 552 F. 2d 565, 568 (7th Cir. 1976) (collecting cases); see also *Procunier* v. *Navarette,* 434 U. S. 555, 98 S. Ct. 855, 865, 55 L. Ed. 2d 24 (Burger, C. J., dissenting).

While these cases involved actions against individual defendants, there would appear to be no basis on which to distinguish post-*Monell* actions against municipalities. In posting the requirement of malicious or reckless conduct,

the Seventh Circuit has relied on the notion that § 1983 is apparently limited in its essential purpose to the redress of intentional—defined as malicious or objectively reckless—violations of constitutional rights inflicted through the exercise of official authority. In *Bonner* v. *Coughlin, supra,* the court observed:

> The dissenting Justices in *Paul* [v *Davis,* 424 U. S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)] were of the view that 'intentional conduct' infringing a person's liberty or property interests without due process of law is within the reach of § 1983 [citation omitted]. They went no further, nor need we. If Section 1983 is to be extended to cover claims based on mere negligence, the Supreme Court should lead the way. 545 F. 2d at 567.

See also Paul v. *Davis, supra,* 424 U. S. at 717, 96 S. Ct. 1155. Such a view does not readily lend itself to exceptions based on the type of defendant involved. Further the application of an intent requirement to actions against municipalities will not create serious conceptual difficulties, since the recklessness standard is an objective one. *See Little* v. *Walker, supra,* 552 F. 2d at 198, n.8."

This Court's view of the necessity of establishing intent in order to constitute a violation of civil rights has been repeated in such cases as *Washington* v. *Davis, Arlington Heights,* and most recently in the *City of Memphis* street closing case. Moreover, the Court has recognized that mere negligence is insufficient to state a cause of action under § 1983 regardless of whether a constitutional violation existed. See *Wood* v. *Strickland,* 420 U. S. 308, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975), at page 322. In that case the Court insisted that there was no immunity if action was taken with malicious intent to cause a deprivation of constitutional rights or other injury to the student. The Court said:

> "Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the con-

> stitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are 'charged with predicting the future course of constitutional law.' *Pierson* v. *Ray,* 386 US, at 557, 18 L Ed 2d 288. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."

See also, *Procunier* v. *Navarette,* 434 U. S. 555, 55 L. Ed. 2d 24, 98 S. Ct. 885 (1978). In *Baker* v. *McCollan,* 443 U. S. 137, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979), this Court specifically refused to hold that mere negligence gave rise to a cause of action under § 1983. The Court again noted that the Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished without due process of law.

The petitioner acknowledges that the municipal defendant can act only through its agents, but asserts that the council members would have known that a revocation of special use permit was taking place without notice and hearing, and was substantially certain to result in the loss of petitioner's building permits. It is contended that as a matter of law, that conclusion meets the level of intent required by tort law.

It must be emphasized that the City Council was not engaged in revoking special use permits without due notice and hearing. The special use permit had expired by its own terms under Illinois law because the petitioner had not complied with the conditions imposed, namely, bringing the property up to applicable code standards within 180 days. The law is clear in Illinois that failure to meet such a standard resulted in the automatic termination of the special use permit. *Goffinet* v. *County of Christian,* 65 Ill. 2d 40, 53 (1976).

The petitioner persists in treating the procedural step of reconsideration as a revocation of the special use permit. No such revocation was taking place. What happened was that the City Council merely reconsidered its action of the week before in extending the time in which compliance with code standards was to take place. There was clearly no intent to deprive the petitioner of any constitutional rights. It had no constitutional right to violate the valid police power ordinances of the City.

The Appellate Court's view of the law as stated by the Seventh Circuit was, of course, absolutely correct as we have indicated from the citations above. The Appellate Court properly considered this Court's decision in *Owen* and found it inapplicable because no 1983 violation had taken place. Contrary to the petitioner's argument, the standard applied is not necessarily "bad faith". The contention of the petitioner that the Appellate Court misread the Seventh Circuit's standard of intent simply is erroneous.

The petitioners likewise misread *Monell. Monell* clearly holds that a municipality may not avail itself of the qualified immunity of its agents. That is not what is involved in this case. The acts were not those of any agents. The acts in question were those of the City Council itself in exercising its undoubted right to reconsider its action of the previous week. The petitioner does not argue that the City Council did not have the authority to refuse the extension of time request. The mere fact that the Council apparently granted the extension one week and rescinded it the next in accordance with its own rules, the state statute, Robert's Rules of Order, and the decided case law in Illinois, does not demonstrate a violation of constitutional rights or a violation of due process.

The petitioner raises the rhetorical question of whether "a litigant has a course of action against the City Attorney for malpractice? negligence?" and concludes that there is no alternative remedy. There is no remedy simply because there

was no wrong. Reliance upon the Fourth Circuit opinion in *Huemmer* v. *Mayor and City Council of Ocean City,* 632 F. 2d 371 (4th Cir. 1980) is, of course, misplaced, because the respondent here was following its statutory right to reconsider an action and not relying upon an ordinance whose unconstitutionality was evident. As the quotation from *Monell* in the petition indicates, a municipality will be liable for all of its injurious conduct. There was no injurious conduct here. There was no violation of due process. There was no constitutional tort. There was no violation of § 1983.

II.

THE COURT PROPERLY DENIED ATTORNEYS FEES UNDER 42 U. S. C. § 1988.

The basic purpose of this petition is to seek attorneys fees on behalf of the petitioner's counsel. The trial court and the Appellate Court both denied attorneys fees. The trial court's denial was made notwithstanding the fact that the petitioner had in fact prevailed on one of its seven counts, i.e., a technical violation of procedural due process. The trial court held, however,

> "The constitutional violation involves *solely* procedural due process. There is absolutely no evidence that it involves the invidious characteristics of racial, religious, ethnic, employment or sex discrimination; nor is there sufficient evidence to establish bad faith or malice or willful and hateful discriminatory conduct; nor is there a pattern or *modus operandi* abridging constitutional rights." (A. 57)

The court held that the defendant's action was within the ambit of its proper legislative function and that the plaintiff's suit was strictly one directed by a private wrong, as opposed to a suit brought for the benefit of the common weal. (A. 58) The court pointed out that no one would reasonably suggest that in

every zoning case absent other circumstances where a municipality's action deprived the property owner solely of procedural due process, the municipality should pay plaintiff's attorneys fees because the plaintiff filed under the Civil Rights Act rather than filing a suit as traditional zoning suits have been filed. The Court concluded:

> "In this regard, it should be kept in mind that virtually all zoning cases involve a fact or an allegation that the property owner's constitutional rights have been violated." (A. 59)

The Court therefore exercised its discretion and did not award attorneys fees, citing *Chastang* v. *Flynn*, 541 F. 2d 1040, 1045, (4th Cir. 1976). (A. 59)

The conclusion reached by the Appellate Court was that the petitioner was not the prevailing party and therefore under no circumstances was it entitled to an award for attorneys fees. (A. 13) It must be emphasized that even at the trial level, the petitioner prevailed on only one of the seven counts. The trial court granted only the prayer of the first count seeking a declaratory judgment that the action of the City purporting to withdraw the special use permit extension was a deprivation of plaintiff's rights. By the time the case got to the Appellate Court, Count I had been rendered moot by the petitioner which had abandoned its use of the property and the Appellate Court so held. Thus, the substantive issue in a seven count complaint upon which the petitioner prevailed was rendered moot by the petitioner's own action before the Appellate Court had an opportunity to pass upon it. We have the anomalous situation of the petitioner claiming to have prevailed on a count which its own action rendered moot after the City had appealed an adverse finding. The Appellate Court could well have reversed the lower court's ruling directing the re-issuance of the special

use permit. Then, of course, there could have been no contention that the petitioner prevailed. The petitioner's own acts prevented such consideration by the Appellate Court.

The petitioner, of course, was not the prevailing party in the Appellate Court. The only part of the trial court's opinion that was reversed was the holding that it was entitled to even the one dollar compensatory damages. The Appellate Court specifically held:

> "Krishna has not succeeded in adequately meeting the requirements under § 1983 for either due process claim or for the equal protection claim. It is evident that Krishna could have no valid argument for the argument for the award of compensatory damages." (A. 13)

The cases cited by the petitioner in the second portion of its argument do not sustain its contention that it is entitled to attorneys fees. It presumes that it is the prevailing party. The very opinion sought to be reviewed specifically holds that it is not the prevailing party. Its own action prevented a review on the merits of the single count in which the trial court had found for the petitioner.

The case of *Maher* v. *Gagne,* does not lend support to the petitioner's claim. *Maher* turned on the question of whether an attorneys fees award can be assessed against a State under the Eleventh Amendment upon settlement of an action in which plaintiff clearly prevailed. In the case at bar, the petitioner could under no circumstances be said to have been the prevailing party. It lost on six of the seven counts in the trial court. It got a judgment of one dollar which was reversed. Although the trial court also awarded a special use permit, it was conceded that the petitioner in fact abandoned the special use permit by never seeking the requisite building permits to remedy the code violations and by relinquishing the use of the property before the case was argued.

Also cited is *New York Gaslight Club, Inc.* v. *Carey,* 447 U. S. 54, 64 L. Ed. 2d 23, 100 S. Ct. 2024 (1980). The Court emphasized in a Title VII case that the purpose of § 1988 was to make it easier for plaintiffs of limited means to bring a meritorious suit. The Court emphasized, moreover, that Congress had cast the Title VII plaintiff in the role of a private attorney general vindicating a public policy of the highest priority. The Court concluded that it was clear that Congress intended to facilitate the bringing of discrimination complaints which had a broad impact.

In the instant case, as the trial court noted, the petitioner was not acting as a private attorney general to vindicate general civil rights. It was involved in a purely private zoning dispute having absolutely no constitutional impact beyond its own disputed use of a single piece of property. The petitioner far from a plaintiff of limited means, is in fact a highly successful money-raising organization, which has made a career in the state and federal courts challenging all types of municipal regulation. This case does not involve the kind of basic civil rights controversy in which a plaintiff of limited means is entitled to attorneys fees in order to vindicate a general and basic constitutional right which has great public importance.

The petitioner also cites *Christiansburg Garment Co.* v. *EEOC,* 434 U. S. 412, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978). That case, however, merely limited the circumstances under which there could be an award of attorneys fees to successful defendants. The court there pointed out not only that the district court had discretion but that the awarding of Title VII plaintiffs attorneys fees was based primarily on the intent of Congress to cast the plaintiff in the role of a private attorney general.

In its petition, Krishna cites the trial court's view that the defendant's revocation of the extension of time was arbitrary and capricious and without procedural due process of law. It,

however, ignores the finding of the trial court in the exercise of its discretion that no attorneys fees should be paid under the facts of this case. There was clearly no abuse of discretion on the part of the trial court. The Appellate Court determined that the petitioner was not the prevailing party and, therefore, not entitled under any circumstances to attorneys fees. It, in fact, specifically raised the question as to whether or not the City, as the prevailing party was entitled to attorneys fees under § 1988. (A. 13) The Appellate Court dissolved the injunction entered by the circuit court and reversed the finding in favor of Krishna on the procedural due process claim. The holding of the trial court that there could be no attorneys fees was affirmed. (A. 14)

The petitioner's claim that an improper use of the Court's narrow discretion to deny fees could damage the utility of the statute by discouraging attorneys from accepting otherwise meritorious cases is clearly unfounded. This case is nothing but a garden variety zoning case. An attempt has been made to utilize § 1983 for the sole purpose of seeking attorneys fees. Not only was the trial court exercising its sound discretion in denying attorneys fees despite holding for the petitioner on one of seven counts, but the Appellate Court properly reversed the single finding in the petitioner's favor and, of course, determined that the petitioner was not entitled to attorneys fees.

It, again, must be emphasized that the trial court's order to reissue the special use permit was rendered moot by the petitioner's action, thus, precluding the respondent from reversing on the merits. To hold that under the facts of this case the petitioner is entitled to attorneys fees would pervert the function of § 1988. Such a holding would have dire consequences for every municipality that dared to defend itself when its police power ordinances were blatantly ignored and then challenged with a specious constitutional claim.

III.

THE PETITIONER'S FIRST AMENDMENT RIGHTS WERE NOT INFRINGED BY THE ACTION OF THE CITY OF EVANSTON.

The petitioner here seeks to cloak itself in the First Amendment. It asserts that the denial of an extension of time to comply with code violations was to deny it the free exercise of religion. That statement is patently false and is illustrative of the willingness of this petitioner to twist the law in its search for attorneys fees and damages for non-existent injuries.

This case does not involve infringement of freedom of religion. The fact of the matter is that in its sensitivity to religious institutions, the City countenanced the illegal occupancy of deteriorating premises for eight years. The petitioner bought the property notwithstanding the fact that it was not zoned for the purposes sought. The petitioner then moved in and utilized the property uninterrupted for a period of eight years during which time it consistently refused to comply with applicable health and safety codes and finally moved out before the final adjudication by the Appellate Court rather than comply with the conditions of the special use which the trial court had directed.

The law is absolutely clear that religious institutions are subject to municipal zoning ordinances and that the refusal to issue a special use permit for a church does not violate the First Amendment. As indicated above, this Court recognized that fact in *American Communications Association* v. *Douds,* 339 U. S. 382, 94 L. Ed. 925, 943, where reference was made to the dismissal of an appeal for want of a substantial federal question when a church group contended that its First Amendment rights were violated by a zoning ordinance preventing the building of churches in certain residential areas.

The law in Illinois is absolutely clear in this regard. *St. James Temple* v. *Board of Appeals,* 100 Ill. App. 2d 302, leave to appeal denied 40 Ill. 2d 78, *cert. denied,* 395 U. S. 946, 23 L.

Ed. 2d 464 (1969) See also *Coston Chapel A.M.E. Church* v. *Chaddick*, 9 Ill. App. 3d 321 (1972); *South Side Move of God Church* v. *Zoning Board of Appeals*, 47 Ill. App. 3d 723 (1977). The view of the Illinois courts and this Court has been followed by courts throughout the nation. All of them hold that churches and other religious institutions are subject to zoning ordinances and that there is no infringement of constitutional rights to freedom of religion because a zoning ordinance prohibits the location of a church in a specific location requested. See for example, *Corporation of Presiding Bishop* v. *City of Porterville*, 90 Cal. App. 2d 656, 203 P. 2d 823; *Milwaukee Co. of Jehovah's Witnesses* v. *Mullen*, 330 P. 2d 5, 27; *Minney* v. *City of Azusa*, 330 P. 2d 255, 259, 266; *Smith* v. *United Presbyterian Church*, 331 Mich. 1, 52 N. W. 2d 568; *Zion Evangelical Lutheran Church* v. *City of Detroit Lakes*, 21 N. W. 2d 203.

We do not question that protection of the free exercise of religion has been accorded a special place in our jurisprudence. We state unequivocally, however, that no freedom of religion is involved when a valid zoning ordinance restricts the location of churches or requires a special use permit as in the case at bar.

In the instant case the City of Evanston originally granted a special use permit to petitioner. It had no desire or intent in any way to preclude the exercise by the petitioner of its religious rights under the First Amendment. Those rights, however, were subject to the police power of the municipality which involved not only the zoning ordinance but the building code, the fire code, the plumbing code and the other police power measures required to protect the public health and safety. When the petitioner continued to flaunt those ordinances, notwithstanding the good will exhibited by the City in overlooking the fact that the petitioner had moved in violation of the ordinance and was occupying the premises without a special use, the City had no reasonable alternative but to deny the continued occupancy which posed a threat to the 40 people living in the building and to the surrounding neighborhood. It

degrades the high position accorded to religious freedom under our constitutional framework to use a religious claim under the circumstances present in the case at bar to prevent the legitimate exercise of municipal power.

No court has ever applied "the compelling state interest" to determine whether or not a religious institution is subject to a zoning ordinance. In fact, as the Appellate Court noted, Krishna did not challenge the validity of legislation requiring religious facilities to acquire special use permits in order to operate in certain limited areas where they are zoned as non-permitted uses. The Appellate Court specifically stated that it was unable to find a cognizable substantive due process issue in Krishna's argument to the court. (A. 6)

The City did not deny ISKON's right to worship at this location. It denied the right of ISKON to utilize a building for public assembly and residential use that was replete with dangerous code violations. When the petitioner demonstrated clearly its unwillingness to comply with the applicable codes, the City then, more than two years after initial occupancy, refused to grant a second special use permit.

The final contention that the Illinois court refused evidence as immaterial and irrelevant which would have shown dissimilar treatment of other religious groups is simply incorrect. As the Appellate Court held, there was a total lack of foundation to demonstrate that any of the evidence sought to be introduced was in any manner comparable to the case at bar. There is no basis in the record for any contention of First Amendment religious discrimination. The record is, in fact, all to the contrary. The City of Evanston exercised infinite patience and gave every opportunity to this petitioner to meet the minimal standards of its public health and safety codes. The continued refusal to meet these standards left the City no choice but to deny the special use. To now claim that First Amendment religious freedom rights were violated is simply an additional indication of the hypocrisy and disregard for law which has manifested itself in the petitioner's behaviour since it first illegally occupied the premises in question.

CONCLUSION

We respectfully suggest that the petition for writ of certiorari fails to indicate any basis for this Court's consideration of what is fundamentally a routine zoning case involving at best purported procedural irregularities. The record below demonstrates that the petitioner leased the property with at least constructive knowledge of the fact that its use was not permitted. It subsequently purchased the property having failed to secure a special use permit because it would not comply with the applicable codes. It then continued to occupy the premises in violation of the City's ordinances, all the while claiming religious persecution.

The only peg upon which the petitioner bases its constitutional claims is an alleged deprivation of procedural due process. To the extent that the Appellate Court accepted such a proposition, the Appellate Court was in error, but the Court recognized there was no malice or intent to deprive this petitioner of its rights and in fact no damages ensued.

The petitioner precluded a review of the substantive issue by moving from the premises and subsequently selling the property at a profit. We suggest that it should not be permitted to utilize this Court for the purpose of attempting to extract attorneys fees and damages when no basis for either exists. The petition should be denied.

Respectfully submitted,

JACK M. SIEGEL
Attorney for Respondent

JACK M. SIEGEL
39 South LaSalle Street
Room 919
Chicago, Illinois 60603
(312) 263-2968